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U.S. DISTRICT COURT
N.D. OF ALABAMA

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ALABAMA**
**NORTHEASTERN DIVISION**

| | | |
|---|---|---|
| **Star Discount Pharmacy, Inc.,** an Alabama corporation; **Propst Discount Drugs, Inc.,** an Alabama corporation; **C&H Pharmacy, Inc.,** an Alabama corporation; **Darden Heritage**, an individual; | } | Case No: CV-11-K-2206-NE |
| Plaintiffs, | } | |
| v. | } | |
| **MedImpact Healthcare Systems, Inc.,** a California corporation; **Michael Struhs**, an individual; **Nicole Adams**, an individual; | } | |
| Defendants. | } | |

**OPPONENT'S BRIEF IN RESPONSE AND OPPOSITION TO DEFENDANTS' MOTION TO EXCLUDE THE TESTIMONY OF Z. CHRISTOPHER MERCER**

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[1]Both *KW Plastics* decisions deal with damages and experts.

**Other**

## INTRODUCTION

Plaintiffs (Star) suffered tremendous damage when Defendants (MI) denied the right to continue ongoing patient relationships. Star dispensed over 10,000 prescriptions to PEEHIP patients in the last quarter of 2010. Then, MI acted and ended these relationships. MI illegally denied reimbursement. The loss of over 10,000 (growing) quarterly prescriptions caused substantial financial damage. Star executives will testify concerning these lost relationships and the financial damages suffered. Star also retained Z. Christopher Mercer (Mercer) to perform a financial analysis concerning the damages due the lost business.

MI notes the trial court has a "gatekeeping role" to ensure expert testimony is sufficiently reliable and helpful to the fact finder. Yet, "this role 'is not intended to supplant the adversary system or the role of the jury.'" *U.S. v.Cordoba*, 2012 WL 3620306 *3 (S.D. Fla. 2012)(quoting *Maiz v. Virani*, 253 F.3d 641, 666 (11th Cir. 2001)). "[I]t is not the role of the district court to make ultimate conclusions as to the persuasiveness of the proffered evidence." *Id*. *3 (quoting *Allison v. McGhan Med. Corp*., 184 F.3d 1300, 1311 (11th Cir. 1999)).

"A review of the case law after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule." *Health & Sun Research, Inc. v.*

*Australian Gold, LLC*, 2013 WL 6086457 *1 (M.D. Fla. 2013)(quoting Rule 702, Advisory Comments). Under *Daubert*, the Court engages in a flexible three-part inquiry. "The Eleventh Circuit refers to each of these three requirements as the 'qualifications,' 'reliability,' and 'helpfulness' prongs." *Cordoba* *2(citing *United States v. Frazier*, 387 F.3d 1244, 1260 (11th Cir.2004)). Mercer far surpasses the requirements of Rule 702. Mercer possesses exemplary qualifications in the applicable field. He thoroughly evaluated the data, including independent data. And, he reliably employed accepted methods to reach opinions concerning lost profits and value that should be heard by the jury. His testimony will assist the jury to understand the evidence and should be admitted.

## I. MERCER IS WELL-QUALIFIED TO PROVIDE OPINIONS ON THE ELEMENT OF DAMAGES SUFFERED BY A BUSINESS

The first prong of a *Daubert* inquiry concerns the qualifications of the witness. "The court's gatekeeping obligation requires that it evaluate a proposed expert's qualifications in light of what is necessary to explain a particular subject matter to the jury." *Smith v. Bama Urgent Medicine, Inc.*, 2011 WL 8635359 *4 (N.D. Ala. 2011). Here, Mercer is offered as an expert concerning damages, *i.e.*, the lost profits and value suffered by Star.

Is Mercer qualified? Absolutely. Mercer has over 40 years experience

valuing businesses. (A). He has prepared thousands of business valuations. (A). He regularly prepares and oversees business valuations for multiple purposes, including mergers, tax issues, and litigation, among others. (A).

Mercer serves on the Board of the International Valuation Standards Council and is a past chairman of the Standards Subcommittee for the American Society of Appraisers. (A). He has published numerous books in his field and over 85 articles on business valuation topics. His expert opinions have been admitted in Federal and State Court proceedings. (A).[2] MI's proffered expert conceded Mercer was qualified and admitted attending one of his many lectures.(B,27:13-28:20).

The "qualification" prong sets a low bar. "[A]fter an individual satisfies the relatively low threshold for qualification, the depth of one's qualification may be the subject of vigorous cross-examination." *Health & Sun Research* at *3 (quoting *QBE Ins. Corp. v. Jorda Enters., Inc.*, 2012 WL 913248 *3 (S.D. Fla. 2012)).

MI does not directly attack Mercer's qualifications as a business valuator. Rather, MI questions Mercer's qualifications in the separate pharmacy field. MI fails to note Mercer has valuated both pharmacies and groceries. (C,10:25-11:19). MI asserts Mercer lacks qualifications in pharmacy issues as opposed to its

[2]Mercer has met Daubert requirements in a published case. *Jack Tyler Engineering Company, Inc. v. Colfax Corp*., 2013 WL 1500510 (W.D.Tenn. 2013)(Retained by defense).

proffered expert Windham. While Windham touted experience in reimbursement data, the results tell a different story. Both Mercer and Windham analyzed ESI data. While Mercer's numbers were "consistent" with MI's actual fourth quarter of 2010 counts, Windham's were artificially lower by almost 25%.

The correct analysis involves Mercer's qualifications in the discipline upon which his testimony is offered, business valuation. In *Maiz v. Virani*, 253 F.3d 641 (11th Cir. 2001), plaintiffs alleged defendants created a real estate investment scheme. Plaintiffs retained a "lost value" damages expert. *Id*. at 662. The expert calculated the money plaintiffs would have earned if invested in real estate rather than pocketed by defendants. *Id*. Defendants challenged the expert's qualifications because he had no real estate experience. *Id*. at 665. The court rejected the challenge, finding "[t]he subject matter of his testimony- calculating the economic losses suffered by the plaintiffs as a result of defendants' conduct- was sufficiently within his expertise." *Id*. Similar challenges are consistently rejected. *See*, *Health & Sun, supra* (witness qualified on damages in trademark case although not expert on infringement issues); *Allen v. Vintage Partners*, 2008 WL 3200721 (E.D. Tenn. 2008)(witness qualified on financial matters despite no experience in transaction matter of real estate); *Wells v. State Farm Fire & Casualty Company*, 2013 WL

6000859 (E.D. La. 2013)(expert qualified on financial motive in arson case despite no experience in fire matters).[3]

## II. MERCER EMPLOYED RELIABLE METHODS TO REACH OPINIONS CONCERNING LOST PROFITS AND VALUE

### A. MERCER REVIEWED AND ANALYZED THE DATA AND INFORMATION NEEDED TO RENDER FINANCIAL OPINIONS

MI argues Mercer never reviewed information needed to formulate valuation opinions concerning the loss of PEEHIP patients. MI is wrong. Mercer first traveled to Huntsville and observed Star's pharmacy and grocery operations. (A). This personal study is important to understand how pharmacy and grocery sales work together.(A). Mercer observed Star's locations and competitive scene. Mercer then researched local economic issues and trends, including population, employment, and per capita income. Mercer's report contains detailed charts analyzing economic indicators. (A). Such information is important to forecast future growth/decline in values. (A).

After investigating local operations and the local market, Mercer reviewed PEEHIP and MI information. (A). Mercer obtained the number of PEEHIP beneficiaries from the RSA. (A). He obtained estimates from Star management

[3]Mercer is not offered as a pharmacy expert. Plaintiffs executives can testify concerning the management of the pharmacy. Mercer is offered solely to valuate damages.

concerning the number of beneficiaries in the Madison County market. (A). He reviewed MI reimbursement terms in its temporary agreement (Oct-Dec 2010) and its ultimatum terms (Jan 2011).(A). Mercer charted and compared the terms. (A, Report, p.8). Mercer gathered information from the Nat. Community Pharmacists Assoc. to analyze ratios of brand and generic drugs typically dispensed.(A) Mercer read multiple depositions. He read testimony of Star executives Heritage and Tow, MI executives Halter and Struhs, and PEEHIP officials Reynolds and Whaley. (A).

After observing Star operations; studying PEEHIP benefits; reviewing economic indicators, PEEHIP numbers, and dispensing trends; and, reading testimony in this case, Mercer turned to Star's financial information. Mercer reviewed information prepared by Star's outside accountants, including financial statements for the years 2005, 2006, 2007, 2008, 2009, 2010, 2011, and 2012. (A). Mercer reviewed Star data concerning prescription counts, pharmacy/grocery sales, and revenue for a multi-year period. (A).

Mercer read agreements between Star and its wholesalers to purchase drugs. (C,136:09-137:08) These agreements detail terms as well as rebate percentages. Mercer reviewed Star's leases and other important documents. And, Mercer reviewed ESI claims data which detailed specific PEEHIP dispensing counts for three years preceding October 1, 2010, when MI became PBM. (C,72:18-24).

MI contends Mercer is a "conduit" and did not review information. That assertion is false. Mercer's report, counting charts, appendixes, and exhibits, is almost 100 pages. (A)[4] The report discusses Mercer's analysis of information from PEEHIP, MedImpact, ESI, Star's outside accountants, Star executives, and other research sources. Mercer is no "conduit." He did his homework. Mercer reviewed substantial information from multiple sources to reach his opinions.

Incredibly, MI contends an expert must review "extrinsic" evidence and that Mercer did not. MI is wrong on both points. Mercer reviewed much "extrinsic" evidence. However, it was not necessary that he do so.[5] To support its erroneous assertion an expert must examine "extrinsic" evidence, MI wrongly cites *KW Plastics v. U.S. Can Co.*, 131 F.Supp.2d 1289 (M.D. Ala. 2001). The expert in *KW Plastics* was excluded because his opinions had no factual basis and were methodologically flawed. As example, that expert based his lost profits calculations upon the production of 22.7 million paint gallons annually despite the undisputed fact the company only had capacity to produce 15 million units. *Id*. at

[4]Mercer not only reviewed available information, he prepared numerous charts and graphs analyzing the data which are included in his almost 100 page disclosure.

[5]In his report, Mercer provided historical PEEHIP prescription counts and detailed the valuable 22% rebate Star received on generic drug purchases from its primary wholesaler (and larger for its secondary one). Incredibly, MI let its expert question both numbers although it possessed the same data and is familiar with drug acquisitions and rebates. Only after learning Mercer reviewed extrinsic evidence on these issues did MI concede the truth.

1292. The trial court's gatekeeping function requires more than simply "taking the expert's word for it" or allowing the expert's "subjective beliefs." *Id*. at 1294. In the case at bar, Mercer did not subjectively guess facts. He utilized actual historical prescription counts, corporate financial statements, and testimony of store executives. Mercer did utilize ample evidence and accepted methodologies.

Under Rule 702, a retained expert need not investigate extrinsic evidence. In *Platypus Wear, Inc., v. Clarke Modet & Co., Inc.*, 2008 WL 4533914 (S.D. Fla. 2008), plaintiffs proffered an expert "in the area of lost profit and damage." *Id*. at *1. Defendant's "main challenge to Mr. Argiz's [expert] testimony is his failure to verify the accuracy of various data." *Id*. at *5. The Court rejected this challenge, stating "contrary to Defendants' assertion, an expert witness is not a private investigator hired to investigate the accuracy of each report or document he uses in creating his report. Instead, the documents or data an expert witness utilizes must only be 'of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.'" *Id*. (quoting Rule 703).

Under Rule 702, "[a]n economic expert may rely on a company's financial statements in calculating damages." *Brighton Collectibles, Inc. v. Coldwater Creek, Inc.*, 2010 WL 3718859 *10 (S.D. Cal. 2010). Mercer utilized Star's financial statements for a multi-year period. While sufficient, Mercer did not stop

with that data. He reviewed local trends and counted PEEHIP dispensing numbers for several years.[6] And, although not necessary, he used his expertise and evaluation of additional outside information to ensure the data supplied by Star "comports with common sense" in the field of valuation. This cross-checking of information with his expertise enhances credibility. And, Mercer's use of common sense in the field is far different than Windham who alleged historical counts not consistent with known MI data and questioned rebates standard in the industry.

The undersigned is confident in the soundness of Mercer's data. His historic dispensing numbers are proven credible. His other figures are based on actual drug procurement contracts and financial statements prepared by licensed accountants. Yet, "[t]he soundness of the factual underpinnings of the expert's analysis and the correctness of the expert's conclusions based on that analysis are factual matters to be determined by the trier of fact..." *Manpower, Inc. v. Ins. Co. of Penn.*, 732 F.3d 796,806 (7th Cir. 2013). As Judge Bowdre noted when evaluating a challenge that an expert's assumptions were speculative– "the challenges asserted go more to the credibility or weight to be given by the jury to the expert's opinions and not to their admissibility under *Daubert*." *Lloyd Noland Foundation, Inc. v. Tenet*

[6]MI asserts Mercer's opinions are simple calculations that do not assist a jury. The claims data analysis reveals how a trained and unbiased valuator can be helpful in a subject matter ripe for inaccurate or misleading results.

*Healthcare Corp.*, 2008 WL 8724641 (N.D. Ala. 2008). In *Wells*, *supra*, a Judge noted "[a]n expert's opinion must be excluded only if it 'is so fundamentally unsupported that it can offer no assistance to the jury.'" *Id*. at *1. MI's questions of Mercer's data or assumptions are issues for trial.

### B. MERCER EMPLOYED RELIABLE PRINCIPLES AND METHODS TO REACH HIS OPINIONS

MI ignores Mercer's analysis and the methodology underpinning his conclusions. Mercer begins by carefully evaluating past performance for several years. He analyzes prescription counts (PEEHIP and aggregate) on a store-by-store basis.(A) He then analyzes aggregate revenues, per prescription revenues, volumes and applicable margins.(A)[7] Again, Mercer analyzes this data and provides reports on a store-by-store and whole company basis.(A) Mercer does not simply claim to have analyzed data. He provides detailed charts and graphs comparing data. (A)[8] His report contains 16 different bar charts comparing and contrasting analytical numbers on a per store and per year basis (A, p. 9-18). Mercer created 28 different spreadsheets comparing/contrasting historical Star numbers per store and per year

[7]MI's assertion Mercer's calculations were based upon "simple math" is incredible. As any financial expert or accountant understands, a final calculation may be straightforward. Yet, the preliminary calculations can be highly complex and beyond the understanding of a layperson.

[8]This was very different from MI's expert Windham who provided no information other than raw conclusions for discussion.

concerning sales, revenues, earnings, margins, costs, and profits. (A). MI glaringly ignores this far-ranging analysis of Star financial numbers, volumes, and margins. MI also neglects to mention Mercer's historical PEEHIP prescription counts.

In analyzing data, Mercer obtained important information concerning the value of PEEHIP prescriptions for several years prior to MI's termination of the relationships. This information included not only prescription counts but margins and yearly growth rates. (A) Mercer employed his historical analysis in calculating current and future losses.[9] In applying his analysis to future losses, Mercer took a conservative approach further lending reliability to the results. For example, he used only a 5% growth rate despite actual numbers revealing a higher average historical rate. (A, See historical chart with margins) In *B-K Cypress Log Homes, Inc. v. Auto-Owners Ins. Co.*, 2012 WL 1933766 (N.D.Fla. 2012), the Court noted lost profits are generally proven by one of two methods: the (1) before and after theory; or, (2) yardstick test. "There can be little dispute that these methods are generally accepted in the economic community." *Id*. at *3. In *B-K Cypress*, the expert utilized a before and after comparison as his methodology. In rejecting a

[9]Mercer utilized accepted methodology. MI proffered no challenge to his methodology of analyzing historical pharmacy results and applying them to future lost pharmacy profits.

Daubert challenge, the Court noted criticisms to "the application of the methodology" are appropriately raised on cross-examination at trial. *Id*. *5.

In utilizing accepted methodology, Mercer also employed his professional judgment to arrive at conservative conclusions. His conclusions are conservative as he factored downward the growth rate moving forward despite a higher historical average. (A) And, he factored downward the gross margin on prescriptions going forward despite larger historical numbers.[10] (A) MI ignores the conservative methodology actually employed by Mercer.

In *KW Plastics v. U.S. Can Co.,* 131 F.Supp.2d 1265 (M.D. Ala. 2001), Judge DeMent noted, lost profits may be proven several ways, including a comparison of the experience by the business before the interruption. *Id*. at 1269. Other courts note, "[t]he usual method for proving lost profits is to present evidence of profit history." *Venetian Stone Works, LLC v. Marmo Meccanica, S.P.A.*, 2011 WL 248109 *1 (W.D. Wash. 2011). This is the acceptable methodology Mercer employed.

MI's challenges to Mercer's lost profit analysis are challenges to his assumptions rather than methodology. He employed the reliable methodology of

[10]MI questions Mercer's use of "simple" math (100-86) to reach 16% gr. margin moving forward. But, he used accepted methods to calculate historical margins (they were consistent or higher in past). Then, under accepted methodology, he utilized the known margin going forward.

utilizing historical margins and volumes. In *Manpower, supra*, the expert similarly obtained data for prior years, calculated growth rates over various periods, vetted the data for anomalies within his experience, discussed issues with management, and then selected a growth rate he felt appropriate. *Id*. at 809. In rejecting a challenge, the Court held the methodology reliable and admissible. *Id*. MI cannot viably challenge historical numbers so it simply and falsely argues they were provided by management. Again, this ignores reality. Valuators typically rely on information provided by management. Mercer went beyond that threshold. MI can no longer challenge numbers of customers lost (its questions of prescription volumes were proven false), so it now ignores pharmacy lost profits and challenges only the portion of lost profits attributable to lost grocery sales by arguing lost customers will return for other non-pharmacy purposes. Again, this is a challenge to an assumption not methodology.

The evidentiary basis of lost customers and grocery sales is more than sufficient to present to the jury. As Tow noted, Star is different in that it operates as a pharmacy-first company. (D,29:21-30:3)[11] The pharmacy drives business. Heritage and Tow explained grocery is convenience-driven in that customers will

[11]Tow also explained how the process is different at a store serving primarily as a grocery, or grocery-first, operation like his prior employer Southern Family. (D,74:10-23)

enter the store for their prescriptions and conduct grocery shopping as a convenience while present. (D,50:12-23). Heritage (Heritage works the main store pharmacy counter and can view customers and Tow visits all stores) testified PEEHIP customers are no longer in the stores following MI's termination of reimbursement. (E,253:1-12; 255:4-256:3) According to Heritage, the customers are lost. Star CFO Larry Pitts also explained the customer bases of pharmacy and grocery generally overlap. (F,39:7-15). If MI disagrees with this factual testimony, it can attack it at trial.[12]

As MI now concedes, it is not the methodology of calculating grocery losses it challenges, but rather an assumption "there is a 'one to one relationship' between pharmacy and grocery sales." (MI Mtn, p.13). Yet, that is a misleading description not in Mercer's report. MI mis-characterizes the assumption and ratio employed to contend it involves individual customer spending between grocery and pharmacy in a one-to-one ratio.[13] The assumption is not a one to one ratio of sales, but rather, these lost patients represented a corresponding percentage of the

[12]MI's only attack is to copy part of an email from Tow with no indication of time period, (before or after PEEHIP, due to increased competition before PEEHIP, etc), subject matter, responsive topic, whether it applied to grocery or pharmacy, or the context. (MI Motion).

[13]MI even creates an elderly widow and misinterprets Mercer's opinion to compare the widow's food purchases to a family. Although not an issue, the elderly widow probably would have moved from PEEHIP to Medicare.

overall grocery customer base at stores containing both pharmacy and grocery. (A). That assumption has support, including testimony of Star executives in the stores daily who knew the lost customers, and say they are gone.[14]

In *Brighton, supra*, a lost profits expert was challenged for his opinion concerning a one-to-one lost sales ratio.[15] In rejecting the challenge, the Court noted the test under *Daubert* is not the ultimate correctness of the opinion. "[T]he Court may not agree with a one-to-one substitution rate, but it is not the trier of fact." *Id*. at *10. Mercer's opinions (1) have sufficient factual basis in the testimony; and, (2) are based upon the well-settled and reliable methodology of determining the "before" value of these customers based on volume and margin, and, then calculating the "after" lost profits due their loss.

In addition to losing profits because its PEEHIP customers are gone, the ultimate values of both pharmacy and market have been impacted. Typically, "[t]he choice of a valuation approach constitutes the exercise of professional judgment, which may be evaluated at trial in assessing the weight to accord the

[14]Again, Mercer chose the most conservative methodology. PEEHIP consultant Jacobs testified well-known industry statistics show a family of four averages $7500 per year in grocery purchases. Using accepted consumer spending habits and employing a methodology based on expected sales dollars, the lost grocery profits figure would be much higher even if the lost customers returned for partial purchases as MI argues and contrary to the testimony.

[15]That expert opined that each sale by the defendant resulted in a lost sale by the plaintiff.

testimony based thereon." *In re Commercial Financial Services, Inc.*, 350 B.R. 520, 534 (N.D. Okla. 2005).

MI only mentions Mercer's opinion on pharmacy lost value to argue it involved "simple math." Again, that's incorrect. Mercer obtained a prior offer from Walgreens to purchase Star prescriptions at a set price. He discussed the offer with Star management determining it was an arms-length transaction. He calculated the overall offer against his prescription counts to determine a per prescription value. Then, he applied that value to the number of PEEHIP-related prescriptions lost to determine lost value solely due MI's actions. Mercer's approach is well-accepted and reliable. Courts have long held fair market value is the price a buyer would pay a seller where both have "reasonable knowledge of all relevant facts and neither person [is] under a compulsion to buy or sell." *Estate of Noble v. Commissioner of Internal Revenue*, T.C. Memo 2005-2 *5 (2005). The best data possible is an offer by Walgreens to purchase prescription files just prior to MI altering the rules to harm independents and favor Walgreens. And, Mercer followed a reliable mathematical process to extrapolate the value on a per prescription basis and apply it solely to the lost PEEHIP prescriptions.

While lost pharmacy value calculations are assisted by objective evidence of a recent purchase offer, no offer has been made for the grocery market. Courts

have noted "valuing a closely-held corporation is a complex matter for which there is no uniform rule." *In re Moyer*, 421 B.R. 587,596 (S.D. Ga. 2007)(quoting *Cerretani v. Cerretani*, 289 A.D.2d 753,754 (N.Y.App.Div.2001)). While no uniform rule exists, "[i]nvestment value is usually a function of the earning power of the corporation." *Matter of Blake v. Blake Agency, Inc.*, 107 A.D.2d 139,147 (N.Y.App. Div.1985). "Many authorities recognize that the most reliable method for determining the value of a business is the discounted cash flow ("DCF") method." *Lippe v. Bairnco Corp.*, 288 B.R. 678, 689 (S.D. NY. 2003). "To determine a market value using a discounted cash flow analysis, one must consider potential cash flows (for example, what the office building will produce after occupancy) and not simply historical cash flows." *Frymire-brinati v. KPMG Peat Marwick,* 2 F.3d 183,186 (7th Cir. 1993). That is precisely the methodology Mercer employed once he determined the financial impact of lost sales "by capitalizing the loss in ongoing cash flow" and discounting it by the weighted average cost of capital. (A). Again, MI did not question the methodology but simply the factual assumption that the customers are lost.

### C. MERCER PROVIDED TESTIMONY THAT WILL ASSIST THE JURY

The bulk of MI's motion reargues prior summary judgment positions, not

expert methodology. Mercer is a financial valuator. Yet, MI argues he should have opined on contributory negligence, proximate cause, assumption of risk, and other issues. MI mis-cites *Hall v. Thomas*, 753 F.Supp.2d 1113 (N.D. Ala. 2010) in support. In *Hall*, plaintiffs alleged defendants depressed wages "by knowingly employing large numbers of illegal immigrants..." *Id*. Plaintiffs proffered an expert, Borjas, for dual purposes of proving both causation and damages. *Id*. at 1128. Borjas appeared to be the only evidence of causation offered. His opinions related to calculations of reduced wages and market causes of that depression.

The present case differs. Witnesses confirm Star was servicing its patients until MI ended the relationships. MI concedes all alleged damages "stem from the loss of PEEHIP customers." (MI Mtn, p.3)[16] Mercer is not offered to testify whether MI's termination of relationships was unjustified or whether Star should have accepted ultimatum terms believed illegal and a loss.

Mercer is proffered concerning damages resulting from the lost customers. In *Eastep v. Newman*, 2013 WL 6835197 (M.D. Ga. 2013), plaintiff was injured in a railroad-crossing collision. Plaintiff employed an expert to evaluate lost income. The expert assumed total disability for his calculations. *Id*. Defendant filed a

[16]MI's contention Star could accept and then recover for inadequate reimbursement is incredible. The contract's severe arbitration rules prevent a legal recovery.

Daubert challenge, contending an assumption of total disability lacked a reliable foundation. *Id*. The Court rejected the challenge, noting experts can provide damage calculations as long as an assumption has a "reasonable factual basis" in the record. Here, substantial testimony supports Star's position it was servicing its patients until MI acted and terminated the relationships. Mercer properly calculated damages based on the undisputed loss of these patients. *See also, Health & Sun Research, supra* (Court allowed expert noting testimony addressed damages in the event defendant is found liable).

MI cites *Lee v. Houser*, 2013 WL 6703454 *12 (Ala.2013), alleging lost profits "must be direct and reasonably certain; they may not be remote and speculative." (MI Mtn.p.13). MI omits subsequent language stating these damages are recoverable although they "may not be calculated easily or with mathematical certainty." *Id*.; *See also, Morgan v. South Cent. Bell Telephone Co.*, 466 So.2d 107, 116 (Ala.1985). "Under the 'reasonably certain' requirement, 'the loss of profits . . . must be capable of ascertainment with reasonable, or sufficient, certainty, or there must be some basis on which a reasonable estimate of the amount of the profit can be made." *KW Plastics,* 131 F.Supp.2d at 1268 (underline added)(quoting *Mason & Dixon Lines, Inc. v. Byrd*, 601 So.2d 68,70 (Ala.1992). Proof of damages may be indirect and include estimates based upon assumptions.

*See, Platypus Wear, Inc. v. Clarke Modet & Co.*, 2008 WL 4533914 *5 (S.D. Fla. 2008). Moreover, "the wrongdoer should not escape liability on the grounds that its misconduct has made it difficult for the innocent plaintiff to precisely determine its loss." *Id*. (citing *Super Valu Stores, Inc. v. Peterson*, 506 So.2d 317,328 (Ala.1987)). And, "[t]here is no one correct way for proving damages" in a claim for lost profits. *Id*.

Incredibly, MI contends Mercer's opinions are simple calculations not helpful to a jury. While the final calculations may be simple to MI, the underlying analysis requires considerable expertise. As a Court noted, "[v]aluation of closely-held companies, is beyond the understanding of lay persons." *In re Moyer* at 596. Moreover, the damages analysis in this case involves issues of patient volume, revenue, and margins, among other concepts, that are beyond the knowledge of a lay person. Expert testimony is helpful and should be admitted.

## CONCLUSION

MI's motion to exclude should be denied. Christopher Mercer is well-qualified, performed a reliable analysis, and will provide testimony helpful to the jury.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Jeffrey G. Blackwell, hereby certify that on July 3, 2014, I electronically filed the foregoing:

**OPPONENT'S BRIEF IN RESPONSE AND OPPOSITION TO DEFENDANTS' MOTION TO EXCLUDE THE TESTIMONY OF Z. CHRISTOPHER MERCER**

with the Clerk of the Court by using the CM/ECF System which will serve all counsel of record by notice of electronic filing, pursuant to Fed. R. Civ. P. 5(b)(2)(E) and Local Rule 5.4.

/s/Jeffrey G. Blackwell
Of Counsel